London, May 8, 2018

Directorate-General for Justice and Consumers
European Commission
1049 Bruxelles/Brussel
Belgium

REFERENCE: ARES (2018)1944240

PUBLIC CONSULTATION ON MINIMUM REQUIREMENTS IN THE TRANSMISSION OF INFORMATION FOR THE EXERCISE OF SHAREHOLDERS RIGHTS

To the European Commission:

I am writing on behalf of **Morrow Sodali** in response to the Commission's request for feedback on "the implementation regulation laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights."

Background

Morrow Sodali is a global consultancy providing comprehensive governance and shareholder services to corporate clients around the world. Our knowledge of the issues covered by the implementing regulation is rooted in the nature and scope of the services we provide in the course of our work with more than 700 listed companies operating in 40 different markets. Specifically, our areas of expertise include: corporate governance, capital markets, shareholder meetings, disclosure, investor communication, share voting, cross-border transactions, activism, contested situations and the many related ownership issues faced by listed companies in today's global marketplace.

Our comments in this letter reflect the insights we gain from working not only with EU companies but with companies based outside the EU. In addition, we engage regularly on behalf of our clients with stakeholders whose interests are affected both directly and indirectly by the Commission's regulations. These stakeholders include: institutional investors, both local and global; shareholder organizations and membership groups; proxy advisors; activists; NGOs and special interest advocates; and other constituents whose engagements with companies utilize regulated channels of communication and share voting. Finally, our comments reflect our firm's uniquely global structure and the range of advisory and transactional services we provide to companies and boards of directors in their dealings with these diverse entities.

The Implementing Regulation

We strongly support the objectives set forth in the opening 12 numbered paragraphs:

- The right of issuers to identify and to know their shareholders.
- The elimination of incompatible national standards through common data formats and message structures.
- Adoption of minimum standards and the encouragement of self-regulation.
- Facilitation and more efficient exercise of shareholder rights through the adoption of technology.
- Standardization of information content and format to facilitate straight-through processing.
- Elimination of obstacles to vote confirmation and verification.
- Speedier processing of communications and vote transmission.
- Security and protection of confidential personal data.

We agree that achievement of these goals is essential to the fair and efficient functioning of the day-to-day mechanics of corporate governance and shareholder democracy.

We strongly support the definitions in Article 1 that provide a clear and consistent structure for the regulation. The definition of "last intermediary" as the intermediary closest to the shareholder, in contrast to the "first intermediary" that is closest to the issuer, is an important first step in eliminating the uncertainties that arise when responsibilities are dispersed through the so-called "daisy chain" of multiple intermediaries. We know from our work in proxy vote solicitation and engagement that in some jurisdictions the layering of intermediaries and advisors has been a source of opaqueness, inefficiency and confusion. These definitions, signalling that the first and last intermediaries will be accountable for the activities of other intermediaries in the ownership chain, will largely eliminate these uncertainties.

This is confirmed by the requirement in Article 5.1, which states explicitly:

- "the first intermediary shall confirm the entitled positions of shareholders in its books."
- "the entitled positions shall be reflected in the records of all intermediaries in the chain."
- "the last intermediary shall confirm . . .the entitled position . . ."

The requirements set forth in Article 5 together with the additional mandates for the first and last intermediaries in Article 9 will promote transparency and efficiency throughout the entire process by which issuers communicate with "the shareholder who holds the shares on its own behalf" and by which the shareholder's voting instructions are in turn transmitted and executed.

Articles 2, 3 and 4 and the related Annexes paint a clear picture of what the standardized documents should look like and how transmission of documents and voting instructions should work.

Articles 5, 6 and 7 and related Annexes address the "holy grail" of the shareholder voting process – vote confirmation and verification. The format set forth in section C of Table 5 requires disclosure of "Voting position" and "Number of shares voted" with respect to the Notice of Participation. This section is repeated in Tables 6 and 7 that govern 'Voting Receipt" and "Confirmation of the recording and counting of votes."

Implementation of these provisions will go a long way to achieving the goal of "elimination of obstacles to vote confirmation and verification."

Throughout the implementing regulation the Commission makes clear that these are "minimum requirements." This approach mirrors the fundamental principle of the voluntary comply-or-explain governance system that promotes content over form and encourages flexibility to accommodate the circumstances of individual companies as well as member states' local regulatory standards. In addition, minimum standards allow room for new developments in technology that can further improve the system's accuracy, efficiency and speed.

Recommendation

As noted above, **Morrow Sodali** is an international firm with headquarters in New York and London, local offices and representatives in ten countries and clients in 40 countries. This global/local structure requires us to understand both the expectations of institutional investors that operate globally as well as the specific regulatory requirements and business practices that affect client companies operating in different jurisdictions. Our work on the mechanics of annual meetings, cross-border transactions and share voting in different jurisdictions places us squarely in the middle of the processes subject to the implementing regulation.

One of the unfortunate realities we encounter in our work with clients in different markets is that the mechanics of shareholder identification, transmission of information and the exercise of shareholder rights vary according to local regulation. These local variations contrast with trends affecting the investment process, which is increasingly global in its reach. Institutional investors, wherever they are based, manage diversified portfolios that include securities of issuers from around the globe. Stewardship standards for investors are also global, requiring asset managers to exercise oversight responsibilities and ownership rights diligently regardless of where portfolio companies are based. In the current environment achievement of investment and stewardship goals is impeded when annual shareholder meetings and cross-border transactions are subject to an array of different jurisdictional regulations governing information flow and share voting.

Clearly, it is beyond the powers of the European Commission to regulate outside the European Union. And yet, what is most urgently needed in today's market is a coordinated effort to find ways for the goals of this implementing regulation to be achieved globally.

For this reason, we recommend that the Commission consider whether it should expand the mandate of its Expert Group on Technical Aspects of Corporate Governance Processes (E03545) to examine the interface of this implementing regulation with other markets, particularly the United States, where some of the largest institutional shareholders of EU companies are likely to be located (albeit in many cases through EC-based subsidiaries). The goal would be for the Expert Group to determine: (i) whether there are inefficiencies in cross-border exercise of shareholder rights at EU listed companies that result from differences in record-keeping, documentation, accountability and interface with other markets; and (ii) how greater efficiency could be achieved.

In the United States, proposals to improve the efficiency of "proxy plumbing," which have been stalled for more than a decade, might be revived by the opportunity to collaborate with an initiative sponsored by the Commission.

Another approach might be to involve IOSCO, possibly through its Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (EMMoU). In explaining its reasons for adopting this "Enhanced" MMoU, IOSCO states:

> . . . there has been a significant increase in globalization and the interconnectedness of financial markets, as well as advancements in technology that have changed the way that the securities and derivatives industry operate and how violations of securities and derivatives laws occur. The lessons of the global financial crisis, and the experience gained by the signatories to the 2002 MMoU have made clear that *it is critical to enhance information sharing and cooperation between IOSCO members: to keep pace with technological, societal and market developments; to bolster deterrence; and to ensure that IOSCO continues to meet its objectives*. [Italics added.]

IOSCO's statement mirrors many of the issues and goals expressed by the Commission in the opening paragraphs of the implementing regulation.

Conclusion

The importance of shareholder communications and share voting has increased in recent years because of many factors, the most significant of which is the recognized value of voting rights themselves. Votes are the primary means by which investors exercise ownership rights and hold corporate boards and executives accountable for managing risk and achieving sustainable financial performance.

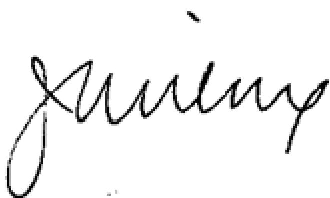
Most recently, recognition of the societal impact of corporations and the demand for them to fulfil their social purpose has drawn greater public attention to policies relating to the environment, societal impact, corporate governance and sustainability.

The importance of the vote will further increase as more investors are introduced to equity ownership through advances in technology. Robo-advisors are already enabling the millennial generation to access equities through such innovations as automated mobile phone apps and other low-cost simplified investment tools. The consequences to issuers are not yet fully understood. It is clear, however, that the next generation is beginning to awaken to the meaning of their equity ownership, the usefulness of their voting rights and their ability to impose their values on companies through social media and other forms of collective action.

For these reasons we applaud the Commission's foresight in promulgating the implementing regulation. We hope that the Commission will further consider ways to enlist the support of regulators in other jurisdictions to increase the efficiency of cross-border processes, achieve harmony at the global level and help listed companies prepare for the future.

We appreciate the opportunity to offer these comments and recommendations.

Respectfully submitted,



John C. Wilcox, Chairman